DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G ST. NW
WASHINGTON DC 20314-1000

CECC-ZA

April 7, 2011

MEMORANDUM FOR

CHIEF, OPERATIONS & REGULATORY COMMUNITY OF PRACTICE (ATTN: CECW-CO / MR. MIKE ENSCH)
DIRECTOR OF REAL ESTATE (ATTN: CEMP-CR /MR. SCOTT WHITEFORD)
ALL DIVISION, DISTRICT, CENTER, AND LABORATORY COUNSEL

SUBJECT: Leases and Cooperative Agreements with Cooperating Associations Follow-Up

1. References.

a. Memorandum from the Office of the Chief Counsel to Chief, Operations & Regulatory Community of Practice (ATTN: CECW-CO / Mr. Mike Ensch), Subject: Leases and Cooperative Agreements with Cooperating Associations, dated June 25, 2010.

b. EP 1130-2-500, Project Operations—Partners and Support, dated 01 June 2006.

c. ER 405-1-12, Real Estate Handbook, dated 30 September 1994.

d. Memorandum from CECW-CO/CEMP-CR for Commanders, Major Subordinate Commands, Chiefs, Operations Divisions, Chiefs Real Estate Divisions, Subject: Guidance Pertaining to Real Estate Instruments and Cooperative Agreements with Cooperating Associations, dated March 15, 2011.

2. Background and Summary. On June 25, 2010, we issued an opinion finding that an inventive mechanism for working with local cooperating associations ("CAs") went beyond the existing legal authorities. See Ref. 1.a. ("CECC-ZA Opinion"). Per Section 4 of the CECC-ZA Opinion, we recommended that the Operations & Regulatory Community of Practice instruct the Districts to review their existing leases and agreements. If these leases or agreements were found to be inconsistent with the CECC-ZA Opinion, we recommended that the Districts revise or terminate those arrangements and, where applicable, execute new leases or agreements consistent with the advice in that opinion. It is our understanding that most affected Districts (i) have completed this review, (ii) have terminated or will soon terminate any improper leases or agreements, and (iii) where applicable, have executed or will soon execute new agreements following the model provided in EP 1130-2-500 ("Model Cooperative Agreement"), see Ref. 1.b. App. P, and new leases following the model provided in ER 405-1-12 ("Model CA Lease"), see Ref. 1.c. Fig. 8-C-7, as amended to include new model language by Ref. 1.d. (together, "Model Documents"). This memorandum provides additional clarification on the limits and restrictions

under the existing authorities applicable to any such new leases and agreements under the Model Documents.

3. Discussion.

a. If executed as provided in the CECC-ZA Opinion, ER 405-1-12, and EP 1130-2-500, it is our view that using the Model Documents will allow the Districts to continue operation of the affected recreation sites while complying with all applicable legal constraints. However, use of the Model Documents will admittedly cause both the Districts and the CAs to lose some of the "benefits" that were gained through use of the inventive mechanism that was the subject of the CECC-ZA Opinion.[1]

b. First, under the Model Documents, USACE may not exercise actual or constructive control over the fees collected or revenues otherwise generated by the CA. When USACE exercises actual or constructive control over funds generated from the use of USACE recreational facilities by third parties, these funds must be viewed as "funds received by the Secretary" and are thus subject to the deposit requirements of 16 U.S.C. § 460d-3. See Ref. 1.a. ¶ 3.c. However, so long as USACE does not have actual or constructive control over the fees collected or revenues generated by the CA from the use of leased property, then the CA is permitted under the ER 405-1-12 version of the Fees, Rates, and Prices clause of the Model Lease ("Original Model Lease FRP Clause") to reinvest these monies to fulfill its obligations under the Model Agreement. See Ref. 1.c. Fig. 8-C-7 ¶ 9. Also, under the alternative Model Lease "Fees, Rates, and Prices" clause announced in Reference 1.d. ("Alternative Model Lease FRP Clause"), the CA may reinvest these monies for the continued administration, maintenance, operation and development of the leased property.[2] See Ref. 1.d. pg. 3. ("All monies received by

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[1] See Ref. 1.a. ¶ 3.b. Unfortunately, these benefits cannot be realized under current law. If USACE desires to receive these benefits, we believe that USACE must seek additional legislation. CECC-G provided legislative language on this point to the Operations and Regulatory Community of Practice in July 2010.

[2] This alternative language is necessary because of a potential gap that appears in the Model Lease and Model Agreement as the arrangement is applied to larger undertakings with an increased range of operation and maintenance responsibilities. As consideration under the Model Lease, the CA commits to assume (in cooperation with the Secretary) operation and maintenance responsibility for the leased premises. Ref. 1.c. Fig. 8-C-7 ¶ 1. However, under the Original Model Lease FRP Clause, the CA is only permitted to use the "[m]onies received . . . from operations conducted on the premises . . . to fulfill its obligations *under the Agreement.*" Id. ¶ 9. The Model Agreement does not list operation and maintenance of the leased property as one of the CA's obligations under the Agreement. See Ref. 1.b. App. P ¶¶ 3&4. Accordingly, as the Original Model Lease FRP Clause restricts use of the fees to those CA obligations discussed in the Model Agreement, and as the Model Agreement does not discuss operation and maintenance of the leased property, it follows that the Original Model Lease FRP Clause does not permit the CA to use monies generated from the use of the leased property to finance the operations and maintenance tasks for which the CA is responsible as consideration for the lease. The Alternative Model Lease FRP Clause announced under Ref. 1.d. remedies this issue by making clear that the CA may use the revenues generated from the leased property to finance the operation and maintenance costs that the CA incurs as consideration for the lease.

the Lessee from operations conducted on the premises must be utilized by the Lessee for the administration, maintenance, operation, and development of the premises.").[3]

c. Second, under the Model Documents, the CA may not collect any fees or assess any user charges if USACE would be prohibited by law from collecting those fees or assessing those charges. Ref 1.c. Fig. 8-7 ¶ 9 ("[N]o user fees may be charged by the CA (Lessee) for use of facilities developed in whole or in part with federal funds if a user charge by the Corps of Engineers for the facility would be prohibited under law."). Accordingly, the CAs may not collect entrance fees or admission fees for public recreation areas located at lakes or reservoirs under USACE jurisdiction. See 16 U.S.C. § 460d-3(a) ("No entrance or admission fees shall be collected ... by any officer or employee of the United States at public recreation areas located at lakes and reservoirs under the jurisdiction of the Corps of Engineers, United States Army).

d. Third, the CA may not use monies collected through the operation of the leased properties to pay costs off the site where collected or for purposes other than those specified in the lease. For instance, if the lease contains the Original Model Lease FRP term, then the CA may not retain 50 percent of the monies that it receives from its operation of a leased recreation site and then use them to pay costs incurred with regard to another property, or to pay the salaries of persons performing tasks other than those specifically identified in the Model Agreement. Similarly, if the lease contains the Alternative Model Lease FRP term, then the CA may not retain these monies and use them to pay costs incurred with regard to another property, or to pay the salaries of persons not directly engaged in the administration, maintenance, operation or development of the leased premises. As set forth in the CECC-ZA Opinion, we are aware of no authority that permits a CA to (i) operate a USACE recreational facility for which USACE retains some operation and maintenance authority (ii) collect fees from third party users of that USACE recreational facility, and then (iii) treat any portion of those fees as its own and use such fees for purposes not related to the operation and maintenance of the leased property. Ref. 1.a. ¶ 3.c.xiii. Put another way, we are aware of no authority that permits the CA to earn this type of return on the taxpayers' investment of operation and maintenance dollars into the leased property.

e. However, depending on which version of Fees, Rates, and Prices paragraph is employed, the CA may use the monies generated through the use of the leased properties to

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[3] The question has been raised as to how to reconcile (a) the fact that the USACE-created Model CA Lease directs how the CA may use the monies collected through the operation of the leased premises, see Ref. 1.c. Fig. 8-C-7 ¶¶ 2, 9, and (b) the requirement that USACE not exercise constructive control over the monies collected through the operation of the leased premises, see Ref. 1.a. ¶ 3.c. In our view, USACE's direction under the Model Lease—whether using the Original or Alternative Model Lease FRP Clause—that the generated revenues be used in a particular fashion does not rise to the level of constructive control. In either variant of the Model Lease, USACE is not attempting to control the CA's funds and thus do through the CA that which it could not do itself. Rather, USACE is acting as landlord to generally define the types of tasks or scope of responsibility that it will accept as consideration under the lease and that it will allow the lessee to perform. As landlord, USACE can establish consideration under the lease and direct the activities of a tenant to protect and conserve the property. We believe that these actions taken as a fundamental part of the landlord-lessee relationship are distinguishable from actions taken to control and indirectly expend CA-collected funds in a way that USACE could not do itself.

fulfill its responsibilities under the Model Documents. If the Original Model Lease FRP Clause is employed, then the CA may use all monies that it receives through its operation of the leased premises fulfill its obligations under the CA Agreement. It must be noted, however, that this version of the Fees, Rates, and Prices paragraph does not permit the CA to use the monies generated from the use of the leased premises to pay the costs of operating and maintaining those premises. As discussed in footnote 2, supra, this version of the Fees, Rates, and Prices clause only allows the CA to use the generated revenues to discharge its obligations under the Model Agreement. See Ref. 1.c. Fig. 8-C-7 ¶ 9 ("Monies received by the Lessee from operations conducted on the premises shall be utilized by the Lessee to fulfill its obligations under the Agreement."). Because operation and maintenance of the leased premises is not one of the CA's obligations under the Model Agreement, see Ref. 1.b. App. P ¶¶ 3&4, this is not a proper use of the revenues generated under a lease executed with the Original Model Lease FRP Clause.

f. Alternatively, if the new substitute Fees, Rates, and Prices paragraph announced in Reference 1.d. is employed, then the CA may use monies generated from the use of the leased premises to pay costs directly related to the administration, development, operation, and maintenance of the leased property. This includes the salaries of CA employees directly involved in the operation and maintenance of the leased premises. For instance, the CA could use revenue generated from a gift shop operated under a CA lease to purchase stock for the gift shop, or could use the fees collected from its operation of a campsite to pay the salary of a CA employee who manages the campsite. However, general administrative costs, including planning or managerial activities, may only be paid with monies collected from the operation of the premises if they are directly related to activities done on the premises.

g. Finally, we acknowledge that a significant issue remains unresolved with regard to the CA's operation and maintenance responsibility. The Model CA Lease is unique among the various model leases in ER 405-1-12 in that it does not vest the lessee with exclusive operation and maintenance responsibility for the leased premises. Instead, as consideration for the lease, the CA is responsible under the Model CA Lease for "the operation and maintenance of the premises . . . , *in cooperation with the Secretary*"—an arrangement that plainly envisions USACE continuing to bear at least some responsibility for the operation and maintenance of the leased premises Ref. 1.c. Fig. 8-C-7 ¶ 2 (emphasis supplied). Compare with id. Fig. 8-C-5 (Lease to Nonprofit Organization for Park and Recreational Purposes). While we believe that 16 U.S.C. §460d permits this type of shared operation and maintenance arrangement, we are concerned that this term provides little specificity when applied to the parties' operation and maintenance responsibilities for large scale undertakings and will thus make the lease difficult to administer or enforce.

h. In a small scale CA program, the limited scope of the endeavor would generally restrict the parties' potential operation and maintenance responsibilities. For instance, if the arrangement only allows for the CA to operate a gift shop on leased property at a USACE recreation site, then the range, volume, and expense of operation and maintenance responsibilities for which USACE and the CA are responsible for "cooperati[ng]" on should be rather limited. In other words, the potential degree of operation and maintenance responsibility

that USACE incurs in a small scale CA program is minimal. And in this scenario, the lack of specificity in the Model CA Lease may not be fatal because the risk of USACE being saddled with unforeseen or unwanted operation and maintenance responsibilities is so negligible.

i. In contrast, as the CA program expands to include many acres of land, multiple buildings or structures, roadways, trails, and so on, there is an increasing universe of operation and maintenance tasks that must be performed for the upkeep of the premises. Yet the Model CA Lease does not assign responsibility for these tasks among the parties, and instead provides that the parties will "cooperat[e]" in fulfilling these operation and maintenance responsibilities.

j. This ambiguity is problematic for two reasons—first, because it is not clear what level of financial commitment USACE must continue to provide for the operation and maintenance of the leased property; and second, because it is not clear what standard of operation and maintenance the CA must provide to satisfy its commitments under the Model CA Lease. Under the Model Lease, the clause that establishes the parties' cooperative operation and maintenance responsibilities would read the same when the CA is expected to fund 99 percent of the operation and maintenance costs, with USACE "cooperat[ing]" with the additional one percent, as when USACE is expected to provide the bulk of the costs with the CA "cooperat[ing]" on the remainder; either funding arrangement is possible under this lease term, and either funding arrangement would fully satisfy the plain language of the lease. As a result, it is impossible to determine at the outset whether the arrangement is "reasonable in the public interest"—i.e., whether the arrangement is appropriate under 16 U.S.C. §460d. As the lease continues in effect, it is also impossible to assess whether the CA is performing adequately. Indeed, so long as the CA provides at least *some* level of operation and maintenance—no matter how minor or insignificant—the CA could argue that it is compliant with the lease—no matter what other funding responsibilities may have been initially contemplated by the parties.

k. This ambiguity that manifests with the expansion of the CA program's scope creates the risk of operation and maintenance shortfalls as the lease proceeds and the true operation and maintenance capabilities of the CA become known. This in turn opens the door for the type of creative, but legally objectionable, funding schemes as were the subject of the CECC-ZA Opinion. To guard against this risk and to ensure that USACE's CA leases are in fact "reasonable in the public interest," as required by 16 U.S.C. § 460d, we believe that this ambiguity in the Model CA Lease must be addressed for all but the most limited CAs. At the same time, we recognize that this issue likely cannot be adequately resolved through the creation of new standard or model language; the identification and explanation of joint operation and maintenance responsibilities will instead likely need to be addressed on a case-by-case basis at the local level with specific regard for the operation and maintenance requirements of each project. Accordingly, we concur with the directive put forward in Reference 1.d.: if it is envisioned that the CA will bear less than one-hundred percent of the responsibility for the operation and maintenance of the leased premises, that arrangement must be clearly documented—either through an approved lease deviation or an appendix—with the approval of the relevant Office of Counsel.

SUBJECT: Leases and Cooperative Agreements with Cooperating Associations Follow-Up

4. Conclusions. If executed as provided in this memorandum, the CECC-ZA Opinion, the CECW-CO/CEMP-CR memorandum, ER 405-1-12, and EP 1130-2-500, it is our view that using the Model Documents will allow the Districts to continue operation of the affected recreation sites while complying with all applicable legal constraints. However, we acknowledge that further action is required to correct a significant shortcoming in the Model Documents regarding joint operation and maintenance responsibilities for large scale CA programs. We stand ready to assist the Operations & Regulatory Community of Practice and local offices as they engage in the effort to address this shortcoming. If you have any questions or concerns, you may contact me at (202) 761-0018, or CPT Steve Rice at (202) 761-8561.

EARL H. STOCKDALE
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